No. 357.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MAX ENDLEMAN and
EDWARD LORD,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF THE UNITED STATES.

BURTON E. BENNETT,
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STATEMENT.

At the adjourned November term of the United States District Court for the District of Alaska, Max Endleman and Edward Lord were indicted by the Grand Jury for unlawfully selling intoxicating liquor in the District, in violation of what is known as the prohibitory liquor law of Alaska. This law is found in Section 1955 of the Revised Statutes of the United States, Section 14 of Chapter

53, of Volume 23, of the United States Statutes at Large, and the rules and regulations prescribed by the President in conformity therewith. Section 1955 of the United States Revised Statutes is as follows:

"The President shall have power to restrict and regu-
" late or to prohibit the importation and use of fire arms,
" ammunition, and distilled spirits into and within the
" Territory of Alaska. The exportation of the same from
" any other port or place in the United States, when des-
" tined to any port or place in that territory, and all such
" arms, ammunition, and distilled spirits, exported or at-
" tempted to be exported from any port or place in the
" United States and destined for such territory, in viola-
" tion of any regulations that may be prescribed under
" this section, and all such arms, ammunition, and dis-
" tilled spirits landed or attempted to be landed or used
" at any port or place in the territory, in violation of such
" regulations, shall be forfeited; and if the value of the
" same exceeds four hundred dollars the vessel upon
" which the same is found, or from which they have been
" landed, together with her tackle, apparel, and furniture
" and cargo, shall be forfeited; and any person willfully
" violating such regulations shall be fined not more than
" five hundred dollars, or imprisoned not more than six
" months. Bonds may be required for a faithful observ-
" ance of such regulations from the master or owners of
" any vessel departing from any port in the United States
" having on board fire arms, ammunition, or distilled spir-
" its, when such vessel is destined to any place in the ter-
" ritory, or if not so destined, when there is reasonable

" ground of suspicion that such articles are intended to " be landed therein in violation of law; and similar bonds " may also be required, on the landing of any such articles " in the territory, from the person to whom the same may " be consigned."

Section 14 of Chapter 53 of Volume 23 of U. S. Statutes at Large is as follows:

"That the provisions of Chapter three, title twenty- " three, of the Revised Statutes of the United States, re- " lating to the unorganized territory of Alaska, shall re- " main in full force, except as herein specially otherwise " provided;

" And the importation, manufacture and sale of intoxi- " cating liquors in said District except for medicinal, me- " chanical and scientific purposes, is hereby prohibited, " under the penalties which are provided in Section nine- " teen hundred and fifty-five of the Revised Statutes, for " the wrongful importation of distilled spirits.

"And the President of the United States shall make " such regulations as are necessary to carry out the pro- " visions of this section."

Endleman ran what is known as the Louvre Theatre, in Juneau, Alaska, the theatre being in the back part of the building, and the bar in the front part. In the evening the large double doors connecting the two rooms were thrown open, and the whole floor was practically one room. In the theatre part there was an upstairs with boxes which were connected with the bar by electric bells used by patrons to summon waiters so as to order, through them, from the bar, intoxicating liquor. Liquor

was also sold in all parts of the house, if ordered, as well as at the bar. Lord was one of Endleman's barkeepers. They were charged with having sold whiskey in that place, to divers persons, on or about the 7th day of December, 1896, and at divers other times before. Evidence was introduced showing sales to various persons at various times, within one year previous to said 7th day of December, 1896. The defendants, in the Court below, offered no evidence. The jury acquitted Lord, but could not agree as to Endleman, and was discharged. Endleman was immediately re-tried before another jury, and found guilty as charged.

ARGUMENT.

1.

The Court below very properly denied defendant's motion to quash the indictment.

The material part of said indictment is as folows:

"That said Max Endleman and Edward Lord, at or near "Juneau, within the said District of Alaska, and within "the jurisdiction of this Court, on or about the 7th "day of December, in the year of our Lord one "thousand eight hundred and ninety-six, and at divers "other times before, did unlawfully and willfully sell to "John Doe and Richard Roe, and to divers other persons, "whose real names are to the Grand Jurors unknown, "an intoxicating liquor called whisky, to wit, one glass, "pint, quart, gallon of said liquor, the real quantity is

" to the Grand Jury aforesaid unknown, without having " first complied with the law concerning the sale of intox- " icating liquors in the District of Alaska."

Counsel for defendant Endleman contend that two or more offenses are charged in the indictment. In order to have their contention logical, we must suppose that at times Endleman could have lawfully sold whisky in Alaska, or that he could have lawfully sold it to certain persons, or that he could have lawfully sold it in certain quantities. As a matter of fact he was absolutely prohibited from selling whisky in Alaska. The gist of the offense is the selling of the whisky, and with that crime he is charged in the indictment, and it was sustained when it was shown that he had made sales that were not barred by the statute of limitations.

Nelson *vs.* United States, 30 Fed., page 112, *et seq.*
2 Wharton Crim. Law, paragraph 1510.
Black on Intoxicating Liquors, par. 464, and the many cases cited.

It is not necessary to name the persons who purchased the whisky, or that their names were unknown to the Grand Jury. In this case, however, the Grand Jury did state that their names were unknown.

State *vs.* Bielby, 21 Wis., 204.

It is, we think, a good thing to show a reasonable number of sales of whisky by the defendant, so as to make out as strong a case as possible for the jury, to show that he is keeping a saloon and is pursuing the business of a

retail liquor dealer, and violating the prohibitory liquor law of Alaska. The offense consists in selling whisky in violation of this law, and it is necessary to prove one or more sales. Therefore, even though a particular sale is alleged in the indictment, it is not necessary to allege to whom it was sold.

Mansfield *vs.* State, 17 Tex. App., page 468.
State *vs.* Muse, 4 Dev. & B., page 319.

We contend that it is immaterial whether or not any vendee is named in the indictment, or whether one, two, or more are named. We do not believe that counsel for defendant Endleman are seriously contending that they, or any one else, might have believed that John Doe and Richard Roe, named in the indictment, were real persons. The mode of procedure in this case was according to the laws of Oregon, as they existed in 1884, when what is called as the Organic Act of Alaska was passed by Congress. The Oregon Criminal Code, at paragraph 80, declares that the indictment is sufficient if it can be understood therefrom "(1) that the act charged as a crime" is "clearly and distinctly set forth in ordinary and concise "language, in such a manner as to enable a person of "common understanding to know what is intended," and (2) that such act "is stated with such a degree of certainty "as to enable the Court to pronounce judgment, upon a "conviction according to the right of the case."

But one crime is charged in the indictment. Selling intoxicating liquor is but one crime. If Congress had thought it wise, it could have passed a law that running

a saloon and maintaining a liquor nuisance to which people resorted in Alaska was a crime. If this had been done by Congress, in charging a person in the same indictment with violating that law, as well as the one prohibiting the sale of intoxicating liquor, it would have been necessary to do it in two counts.

State *vs.* Lund, 30 Pac., 518.

We submit that the indictment squarely informed defendant Endleman of what he was charged and of what law he violated.

2.

The Court below very properly overruled defendant's demurrer to the indictment.

Alaska was acquired by the United States by purchase from Russia. Alaska belongs to the United States, and it has a right to govern it as it sees fit.

Story, Const., par. 1324.

It has never thought best to grant Alaska a Legislature, but makes the laws for Alaska through Congress. In 1884 when Congress passed what is known as the Organic Act, it was expressly provided therein that intoxicating liquors should not be sold as a beverage in Alaska. That it has the power to so legislate is well settled.

Nelson *vs.* United States, 30 Fed., page 112 *et seq.*

When Congress so legislated it assumed the combined powers of the Federal and State governments and had a right so to do.

American Ins. Co. *vs.* Canti, 1 Pet., 546.

I take it for granted that it is now well settled that a State has power to pass a prihibitory liquor law. Such being the case, Congress has the power to pass a prohibitory liquor law, as well as a State, and such a law does not in any manner conflict with the Constitution of the United States.

State *vs.* Lindgrove, 41 Pac., 688; Kan App., page 51.

It is thus seen that Congress has all the powers to govern Alaska that Alaska would have to govern itself were it a State. And it follows that Congress has the absolute power to prohibit the manufacture and sale of intoxicating liquor in Alaska. In Crowley *vs.* Christensen, 137 U. S., at page 91, the Court most ably expressed the opinion of the thinkers of the present day when it said: "There "are few sources of crime and misery equal to the dram-"shop. * * * Not only may a license be exacted "from the keeper of the saloon before a glass of his li-"quors can be thus disposed of, but restrictions may be "imposed as to the class of persons to whom they may be "sold, and the hours of the day, and the days of the week, "on which the saloon may be opened. Their sale in that "form may be absolutely prohibited. It is a question of "public expediency and public morality, and not of Fed-"eral law. The police power of the State is fully compe-"tent to regulate the business, to investigate the evils, "or to suppress it entirely. * * * As it is a business "attended with danger to the community, it may, as has "already been said, be entirely prohibited. * * * It "is a matter of legislative will only."

The sale of intoxicating liquors in Alaska is entirely with Congress, and is a matter of legislative will only. Congress used its power, and absolutely prohibited the sale of intoxicating liquors in Alaska, which it had full authority to do.

Cantini *vs.* Tillman, 54 Fed., page 969, *et seq.*

Nor is such legislation repugnant in any way with the Constitution of the United States.

Cantini *vs.* Tillman, 54 Fed., page 969, *et seq.*
Beer Co. *vs.* Massachusetts, 97 U. S., page 25.
Foster *vs.* Kansas, 112 U. S., page 201.
Mugler *vs.* Kansas, 123 U. S., page 623.
Black on Intoxicating Liquors, paragraphs 37, 89 to 90, both inclusive, and the large number of authorities cited thereunder.

In Mugler *vs.* Kansas, 123 U. S., Mr. Justice Harlan, in delivering the opinion of the Court, said: "That legis-" lation by a State prohibiting the manufacture within " her limits of intoxicating liquors to be there sold or bar-" tered for general use as a beverage, does not necessarily " infringe any right, privilege, or immunity secured by " the Constitution of the United States, is made clear by " the decisions of this Court, rendered before and since " the adoption of the Fourteenth Amendment, to some " of which, in view of the questions to be presently con-" sidered, it will refer." He then reviewed the following cases:

License Cases, 5 How., 504.

Bartemeyer *vs.* Iowa, 18 Wall., 129.

Beer Co. *vs.* Massachusetts, 97 U. S., 25.

Foster *vs.* Kansas, 112 U. S., 201.

Intoxicating liquors cannot be imported into the District of Alaska in original packages, or otherwise, or at all. Chapter 728 of Volume 26 of the United States Statutes at Large entirely disposes of this question. It reads as follows:

"That all fermented, distilled, or other intoxicating "liquors transported into any State or Territory, or re- "maining therein for use, consumption, sale, or storage "therein, shall upon arrival in such State or Territory, "be subject to the operation and effect of the laws of such "State or Territory, enacted in the exercise of its police "powers, to the same extent and in the same manner as "though such liquids or liquors had been produced in such "State or Territory, and shall not be exempt therefrom "by reason of being introduced in original packages or "otherwise."

That Congress has the power to govern Alaska is unquestioned. It follows from the fact that it belongs to the United States. In such governing, in exercising the police powers incidental thereto, it has the power to absolutely prohibit the manufacture, importation, and sale of intoxicating liquors in the territory, as it has done.

In re Rahrer, 140 U. S., page 545, *et seq.*

That the police power is distinct from the commercial power is shown in the last above cited case. At times the police power and commercial power nearly run into each other.

Brown *vs.* State of Maryland, 12 Wheat., 441.

The contention of counsel for the defendant that there is no law prohibiting the sale of intoxicating liquors in the District of Alaska is, we think, entirely wrong. Section 14 of Chapter 53 of Volume 23 of the United States Statutes at Large says, among other things:

"And the importation, manufacture and sale of intoxi-
"cating liquors in said District, except for medicinal, me-
"chanical and scientific purposes, is hereby prohibited
"under the penalties which are provided in Section nine-
"teen hundred and fifty-five of the Revised Statutes, for
"the wrongful importation of distilled spirits.

"And the President of the United States may make
"such regulations as are necessary to carry out the provi-
"sions of this section."

It will be observed that the manufacture, importation, and sale of intoxicating liquors in Alaska, except for certain prescribed purposes, are absolutely forbidden by this section. To find out what the penalty is for breaking this law, we simply turn back to Section 1955 of the Revised Statutes.

3.

A prohibitory law is different from a law which aims to regulate the liquor traffic. In the one case, no sales are allowed; while in the other, liquor may be sold under certain conditions. In the one case, all sales are illegal, in the other, some are legal and some are not. Therefore, with such a law as Alaska possesses, there is no reason why the gov-

ernment should be compelled to rely upon any particular sale. If the jury believe from all the evidence in a case, that the defendant sold intoxicating liquor in Alaska, and the same is not outlawed, then he is found guilty as charged. He is not found guilty of any particular sale, but of selling. To hold otherwise would be most oppressive for the government, for juries in Alaska will acquit if the least reason can be found for them to do so. It has taken 17 years to secure a conviction from a petit jury in a liquor case. If the government is compelled to rely upon some one particular sale, while the jury may be satisfied beyond any doubt that the defendant is guilty, it gives it a chance to at least not agree. There is no reason for any such rule as this. The offense, when committed, is that of selling intoxicating liquor, when the selling of the same is entirely prohibited. Even in States where the law is not strictly prohibitory, as this law is, other sales are allowed to be proven other than those set out in the indictment.

State *vs.* Smith, 22 Vt., page 74.

State *vs.* Croteau, 23 Vt., page 14; 54 Am. Dec., page 90.

4.

The Court below very properly allowed the plaintiff to show any sales of whisky made by the defendant within one year previous to obtaining the indictments against him. The gist of this offense is, as we contend, the selling of whisky, and particular sales to particular persons at particular times has nothing to do with it. If the de-

fendant sold any intoxicating liquor in Alaska, he committed a crime, and if the same is not barred by the statute of limitations, he was properly prosecuted therefor.

State *vs.* Rem, 41 Kan., page 674.

The special tax stamp of the defendant was properly excluded as evidence for him by the Court, as he was not being prosecuted for violating the Revenue Laws of the United States, but the local prohibitory Act of Alaska. In Maine and Massachusetts it has been declared by statute that it is *prima facie* evidence that a person is selling intoxicating liquors, if he has a special tax stamp. These statutes have been declared to be valid, and only declaratory of the common law.

Comm. *vs.* Uhrig, 146 Mass., page 132.

5.

The Court below very properly instructed the jury as to the law of this case, and when it stated that "the fact "that it was a glass, pint, quart, cuts no figure, as the "law authorizes the allegation to be made in that way." The quantity or amount of liquor cuts no figure, but only the sale. The prohibitory law of Alaska is different from the laws of some of the States where liquor is allowed to be sold in certain quantities, for instance, not more than a quart at a time. In such case, the quantity is material, and it would be necessary to allege that not more than one quart was sold. In this case, the Grand Jury said, in the indictment, that the exact quantity of whisky sold by the defendant was to them unknown.

6.

The Court below very properly instructed the jury as follows:

"The Federal Courts allow the Judges sometimes to "give an opinion on the evidence. I gave my judgment "to the other jury, and I will give it to you. I do not "see any way that these defendants can be acquitted, "notwithstanding I charge you that you are the judges "of the evidence, and, from that evidence, it is for you "to say whether or not they, or either of them, are "guilty."

In the State Courts where, from the undisputed testimony, it is evident that no other verdict than the one arrived at could have been returned, the instructions of the Judge are immaterial.

Martin *vs.* Union Mutual Insurance Co., 13 Wash., page 275.

Hardin *vs.* Mullin, 16 Wash., page 647.

In criminal cases in Federal Courts, Judges have even gone so far as to instruct the jury to convict the defendant.

United States *vs.* Anthony, II Blatch., page 200.

This practice has been severely criticised, but the rule is well settled that they have a right to express their opinion to the jury.

United States *vs.* Taylor, 3 McCrarry, page 500, *et seq.*

4 Fed. R., page 470, *et seq.*

Wharton, Crim. Law (7th Ed.), par. 82a.

In this case the Court below expressly said, after expressing its opinion, "notwithstanding I charge you that "you are the judges of the evidence, and from that evi- "dence it is for you to say whether or not they, or either "of them, are guilty." The charge was clear and fair, although from the evidence, no other conclusion could be reached than that the defendant was guilty.

7.

The Court below very properly instructed the jury as to the law in regard to principal and agent, servant, or employee, and its instructions were correct.

A person is guilty of unlawfully selling intoxicating liquor when it is supported by proof that he sold by his servant, agent, or employee.

Comm. *vs.* Park, 1 Gray, 553.
Parker *vs.* State, 4 Ohio St., 563.

And evidence that the sale was made in defendant's barroom or saloon, by a barkeeper or person apparently in charge there is *prima facie* evidence of the knowledge and consent of the owner.

Kirkwood *vs.* Autenreith, II Mo. App., page 515.
Amerman *vs.* Kall, 34 Hun., 126.

And a conviction for selling intoxicating liquor has even been sustained where a man went to defendant's saloon on Sunday, and, he (the defendant) not being present, was told by a boarder to help himself from a certain bottle, which he did, leaving the price thereof on the counter.

Black on Intoxicating Liquors, paragraph 510.
Pierce *vs.* State, 109 Ind., 535.

CONCLUSION.

We respectfully submit that the Court below, in this case committed no reversible errors, and that the judgment thereof should be sustained.

BURTON E. BENNETT,
United States Attorney.

ADDENDA.

If the Congress of the United States does not possess the power under the Constitution, to restrict the sale and importation of intoxicating liquors into a territory such as Alaska, then it must follow according to the theory advanced by the plaintiff in error, since Alaska has no Legislature, that there is no legislative power which can make regulations in that behalf, and the citizens of such territory would have no protection whatever against the evil of unrestricted importation and sale of liquors, with all the evils which might confessedly flow therefrom; and no power whatever exists anywhere to regulate commerce as affecting Alaska.

The contention of the plaintiff might perchance have some plausibility, if there was any legislative body in Alaska.

But the whole power of legislating for that territory seems to be vested in the Congress of the United States, and to suppose that the framers of the Constitution of the United State sintended to leave the citizens of any territory which might be acquired by the United States by purchase or treaty, without any protection in this regard, would be to make it a peculiar hardship on such territory and its citizens, and to cast a very severe reflection both on the patriotism, and the good sense of the makers of that venerated instrument, the charter of all our rights as a great and civilized nation.

The Constitution of the United States it is true does reserve to the States all rights not granted therein to the general government, but the States own the territories in common, and their representatives legislating for the preservation of such reserved rights, it would seem, have the power to pass just such an intoxicating liquor law as the one under discussion.

If, therefore, the States, who own in common, the territory of Alaska, by their Congress, choose to legislate as to one of the rights reserved to all such States in common, and to prohibit the importation and sale of intoxicating liquors into their territory, it would seem that they have the right to do it.

Whenever any citizen of the United States, is in a territory which belongs to the States in common, he is there with full knowledge of the power possessed by the States, through their Congress, and if he goes there with such knowledge, how can he justly complain, of the exercise of a power inherent by the Constitution in the States?

It seems to me that there is no other sound Constitutional theory, than the contention here made, which would reserve to the States as to their common territory, the rights guaranteed to them by the Constitution.

It does not look reasonable that a territory without a legislative body, and which belongs to the States in common, can have as great a right as the States, which have the attribute of sovereignty and possess legislative bodies; and neither sovereignty inheres in the territory under the Constitution, or does any legislative body exist in

the territory which can make any laws on the subject. The basis of all the decisions as to this matter cited by counsel in support of their position seems to point unerringly to the proposition, that the States have reserved rights, but that as to the territories, the common property of the States, Congress alone can legislate as to common property of the States, especially where no territorial Legislature exists.

It would be a heavy blow struck at the sovereign rights of States, and the power of their Congress to deny the Constitutionality of such a law, and to leave Alaska, and all other territories which may hereafter be acquired by the States, without any law on the subject of the importation and sale of intoxicating liquors. Congress has the right to admit new States into the Union, and to prescribe what kind of Constitutions they must possess, so that it be republican in form.

As was the case in reference to the institution of slavery, Congress had the right to demand that States seeking admission must prohibit the further existence of that institution.

So also as in the case of Utah, Congress had and exercised the right to prohibit polygamy, in the new State. To declare, at this date, and in view of the history of our common country, and the decisions of the Courts of last resort, that Congress has no power to pass such a law as that now under consideration, would be to erect into sovereign States territories which have never yet been so declared by Congress, to exist as sovereign States of the Union. So it would happen if